SUPREME COURT U. S.
FILED
JUN 22 1961
JAMES W. BROWNING, Clerk

# Supreme Court of the United States

OCTOBER TERM 1960

No. 168

PARTENREEDEREI "WALLSCHIFF", owner of the M/V WALLSCHIFF, and AMERICAN SEATING COMPANY and AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, ET AL.,

*Petitioners,*

—*against*—

THE STEAMER PIONEER and THE CLEVELAND-CLIFFS IRON COMPANY, as bareboat chartered owner of the Steamer Pioneer,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MACDONALD DEMING,
*Counsel for Petitioner*
*Partenreederei "Wallschiff"*
80 Broad Street
New York 4, N. Y.

RICHARD F. SHAW,
*Counsel for Petitioners*
*American Seating Company, et al.*
99 John Street
New York 38, N. Y.

RICHARD G. ASHWORTH,
DONALD M. WAESCHE, JR.
*Of Counsel*

# INDEX


PAGE

CITATIONS TO OPINIONS BELOW ..... 2

JURISDICTION ..... 2

QUESTIONS PRESENTED ..... 2

STATUTES INVOLVED ..... 3

STATEMENT ..... 3

REASONS FOR GRANTING THE WRIT ..... 4-11

This case is one of first impression in that this Court has not yet passed on the principles governing application of the Canadian proportional fault rule. The case involves conflict with long-standing safety of navigation Rules laid down by this Court, by Congress, and by the United States Coast Guard, conflict with decisions of Courts of Appeals of other Circuits, and conflict with the apportionment of fault in British and Canadian courts. It is of great public importance in view of the anticipated increase of navigation in the Great Lakes resulting from the advent of the St. Lawrence Seaway

CONCLUSION ..... 11

APPENDIX A—Opinions, findings of fact, conclusions of law, and judgments below ..... 1a

APPENDIX B—Statutes and regulations ..... 35a

## CITATIONS


PAGE

CASES

*A. H. Bull S. S. Co.* v. *U. S.*, 34 F. 2d 614 ..... 6, 7
*Alletta, The*, [1960] 1 Ll. L. R. 588 ..... 8
*Anna W, The*, 201 Fed. 58 ..... 10
*Ariadne, The*, 80 U. S. 475 ..... 5, 9
*Canadian Pacific Railway* v. *Vancouver Tug*, [1957] Exch. C. R. 95 ..... 8
*Curtis Bay Towing Co., The* v. *Sadowski*, 247 F. 2d 422 ..... 10
*Dahlmer* v. *Bay State Dredging & C. Co.*, 26 F. 2d 603 ..... 10
*Edison Mariner, The*, [1955] 1 Ll. L. R. 235 ..... 8
*New York, The*, 175 U. S. 187 ..... 6, 7
*Oregon, The*, 158 U. S. 186 ..... 9
*Postal S. S. Corp.* v. *El Isleo*, 308 U. S. 378 ..... 9
*S. S. Heranger, The* v. *S. S. Diamond*, [1939] A. C. 94 ..... 8
*Union S. S. Co.* v. *Latz*, 223 Fed. 402 ..... 10
*U. S.* v. *Delaware Bay of R. P. Assn.*, 44 F. 2d 1 .. 10

STATUTES

Canada Shipping Act of 1934, § 640 ..... 3
Great Lakes Rules
Rule 26, 28 Stat. 649, Title 33 U. S. C. § 291 .... 6

REGULATIONS

United States Coast Guard Pilot Rules for the Great Lakes
33 C. F. R. § 90.2 ..... 6
33 C. F. R. § 90.4 ..... 9

MISCELLANEOUS

Griffin on Collisions ..... 10

IN THE

# Supreme Court of the United States

OCTOBER TERM 1960

| | |
|---|---|
| PARTENREEDEREI "WALLSCHIFF", owner of the M V WALLSCHIFF, and AMERICAN SEATING COMPANY and AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *et al.*, *Petitioners,* —*against*— THE STEAMER PIONEER and THE CLEVELAND-CLIFFS IRON COMPANY, as bareboat chartered owner of the STEAMER PIONEER, *Respondents.* | No. |

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Partenreederei "Wallschiff" and American Seating Company et al. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled consolidated case on February 24, 1961, and adhered to by order entered on March 27, 1961 denying timely petition for rehearing, which judgment affirmed on the opinion below the final decree of the United States District Court for the Eastern District of Michigan, Southern Division.

## CITATIONS TO OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Michigan, Southern Division, printed in Appendix A hereto, *infra*, page 1a, is reported in 164 F. Supp. 421 and 1950 A. M. C. 2511. The unreported findings of fact, conclusions of law, and final decree of the District Court are printed in Appendix A hereto, *infra*, pages 21a, 27a, 28a. The opinion of the United States Court of Appeals for the Sixth Circuit, printed in Appendix A hereto, *infra*, page 31a, is reported in 287 F. 2nd 886 and 1961 A. M. C. 660. The unreported order of the Court of Appeals denying the petition for rehearing is printed in Appendix A hereto, *infra*, page 33a.

## JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was handed down February 24, 1961 and judgment was entered on the same day. The timely petition to the Court of Appeals for rehearing, filed on March 14, 1961, was denied by an order filed March 27, 1961. The jurisdiction of this Court is invoked under 62 Stat. 928, Title 28 U. S. C. § 1254 (1).

## QUESTIONS PRESENTED

Whether this Court should not fill the hiatus now existing as to the criteria governing allocation of degrees of fault by a United States Court in applying the rule of proportionate fault in maritime collisions, and whether the Courts below did not err in apportioning only 5% fault to a vessel which, in violation of the navigation safety requirements laid down by this Court, the Courts of Ap-

peals, Congress, the Coast Guard, and British and Canadian Courts, failed to maintain a proper lookout and failed to stop when danger threatened.

## STATUTES AND REGULATIONS INVOLVED

The case involves the rules for the prevention of collisions to be followed in the navigation of vessels on the Great Lakes, 28 Stat. 645, Title 33 U. S. C. §§ 241-295; the United States Coast Guard regulations for navigation on the Great Lakes, 33 C. F. R. Part 90; and Section 640 of the Canada Shipping Act of 1934. The texts of the pertinent portions of the foregoing statutes and regulations are printed in Appendix B, *infra*, page 35a.

## STATEMENT OF THE CASE

This case arose out of a collision at the upper end of the St. Clair River between the downbound American steamer Pioneer and the upbound German motorvessel Wallschiff on the evening of October 2, 1953. Both vessels were navigating in the territorial waters of the United States until a few seconds before the collision, which took place in the territorial waters of the Dominion of Canada, the international boundary running down the center of the St. Clair River in the area concerned. As a result of the collision, the Wallschiff, with her cargo, sank and the Pioneer also sustained serious damage.

The libel in admiralty of your petitioner, Partenreederei "Wallschiff", as owner of the Wallschiff, against the Pioneer and against respondent, The Cleveland-Cliffs Iron Company, as her bareboat chartered owner, was filed in the United States District Court for the Eastern District of Michigan, Southern Division on December 15, 1953. Respondent's cross-libel was filed on December 21, 1953. The

libel in admiralty of your petitioners, American Seating Company et al., owners and insurers of the cargo laden on the Wallschiff, against the Pioneer and against respondent The Cleveland-Cliffs Iron Company, was filed in the same court on June 28, 1954.

The District Court had jurisdiction under the provisions of the Judiciary Act of September 24, 1789, 63 Stat. 101, Title 28 U. S. C. § 1333(1), pertaining to the admiralty jurisdiction of the District Courts.

After a trial on the merits of the consolidated causes, the District Court held both vessels at fault, apportioning liability under the applicable Canadian statute, 95% on the Wallschiff and 5% on the Pioneer, with the result that the Wallschiff cargo recovered only 5% of its damages, and the Wallschiff is required to pay 95% of the Pioneer's damages less 5% of the Wallschiff's damages.

The Opinion of the District Court was filed on May 21, 1958 (Appendix A hereto, page 1a) and the findings of fact, conclusions of law, and final decree of the District Court were filed on December 30, 1959 (Appendix A hereto, pages 21a, 27a, 28a). On March 28, 1960 petitioners filed notices of appeal to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals had jurisdiction under 62 Stat. 929, Title 28 U. S. C. § 1291, § 1292(3).

The Court of Appeals affirmed on the Opinion below in its order entered February 24, 1961 (Appendix A hereto, page 31a) and on March 27, 1961 denied petitioners' petition for rehearing (Appendix A hereto, page 33a).

## REASONS FOR GRANTING THE WRIT

The decision and opinion in this case establish a dangerous and important precedent. Its great public importance results from its application to the growing interna-

tional trade in the Great Lakes resulting from the opening up, by the St. Lawrence Seaway, of what has been referred to as the Fourth Seacoast of the United States. Its novel danger is that it has by misinterpretation of Canadian law in effect abrogated vital American navigation Rules established by this Court, by Congress, and by the United States Coast Guard.

The until now rare necessity of applying the Canadian rule of proportional fault will certainly arise with increasing frequency as the Great Lakes trade grows. It is therefore a matter of great public importance that this Court scotch now the tendency toward disregard of the Rules of navigation begun by the misinterpretation of Canadian law in the present decision. The allocation of only 5% fault on the Pioneer for her violation of two of the most vital navigation rules, keeping a proper lookout and stopping when danger arises, in effect abrogates important Rules of American collision law, on the basis of a basic misconception as to the Canadian law as to proportionate fault in maritime collisions.

This Court has said that "The duty of the lookout is of the highest importance.", *The Ariadne*, 80 U. S. 475, 478. Yet the Courts below completely exonerated the Pioneer for her inexcusable failure to keep a proper lookout: navigating at full speed ahead down the St. Clair River at night, the Pioneer failed to see the Wallschiff until a little over one minute before collision, when the vessels were only about half a mile apart, and thus too late to obey the Coast Guard regulation requiring that signals be exchanged and understood before the vessels come within half a mile of each other.

This Court has also stated that "Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, * * * she is bound

to stop * * *". *The New York*, 175 U. S. 187, 201. The Courts below made an unequivocal finding that this Rule was disregarded by the Pioneer, which continued at full speed ahead until ten seconds before the collision. Yet this inexcusable failure by the Pioneer to obey the statutory injunction to stop and reverse immediately when danger threatened was allocated only 5% fault under the Canadian rule providing for proportionate fault. This is to give lip service to this vital safety rule, while actually denying it practical effect—very probably as a result of a mistaken understanding by the Courts below of the proportional fault principle, which is still novel in the United States.

**1. The time has come for this Court to pass for the first time on the principles governing the Canadian proportional fault rule. The Courts below by misinterpreting that rule have virtually annulled this Court's injunction that a vessel must stop when her signal is unanswered.**

It is a fundamental principle of United States maritime collision law that "There is no more important rule" than that a vessel in close quarters with another vessel which has not answered her passing signal must immediately stop. Court of Appeals for the Second Circuit, in *A. H. Bull S. S. Co. v. United States*, 34 F. 2d 614, 616. Congress and the Coast Guard require it: Great Lakes Rule 26, 28 Stat. 649, Title 33 U. S. C. § 201; Coast Guard Regulation 90.2, 33 C. F. R. § 90.2.*

*Regulation 90.2 Danger Signal. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously or from other causes, the pilot so in doubt shall immediately signify the same by giving the danger signal of several short and rapid blasts of the whistle not less than five; and if both vessels shall have approached within half a mile of each other, both

The Courts below held the Pioneer in violation of this important requirement, in that she continued on at full speed ahead until some ten seconds before the collision, despite having received no answer to her passing signal and having seen the Wallschiff alter course to cross the Pioneer's bow.

The Courts below, however, grievously erred, we submit, in allocating only 5% fault to the Pioneer for this flagrant violation of the statutory and regulative requirements. That decision is in direct conflict with the decision of this Court in *The New York, supra*, 175 U. S. 187, 201, 207:

> "Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty. (p. 201)
>
> * * *
>
> "The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect." (p. 207)

The decision below is also in direct conflict with the decision of the Court of Appeals for the Second Circuit in the *A. H. Bull* case, *supra*, 34 F. 2d at page 616:

> "Her signal had not been answered, and she could not in the nature of things know what the Chinook

---

shall be *immediately* slowed to a speed barely sufficient for steerageway, and, if necessary, stopped and reversed, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other. (33 C. F. R. § 90.2, emphasis added)

> proposed to do. Under such circumstances a master is bound to stop his way. [Citing cases] *There is no more important rule*, since vessels, though not quite dead, will so reduce their speed that the collision, if it occurs, will be insignificant, as certainly would have been the case here." (Emphasis added)

This grievous conflict with vital safety rules of statute, regulation, this Court, and the Court of Appeals for the Second Circuit probably results from a mistaken understanding of the principles (still novel to United States courts) of the Canadian proportionate fault rule. *No* British or Canadian maritime proportionate fault case has *ever* allocated as little as 5% for any fault; and they consistently award at least 25% for the grievous fault here involved of failure to stop in the face of urgent and apparent danger. *The S. S. Heranger* v. *S. S. Diamond*, [1939] A. C. 94 (⅓ solely for failure to reverse earlier); *Canadian Pacific Railway* v. *Vancouver Tug*, [1957] Exch. C. R. 95 (25% solely for failure to reverse earlier); *The Alletta*, [1960] 1 Ll. L. R. 588 (25% solely for failure to reverse earlier); *The Edison Mariner*, [1955] 1 Ll. L. R. 235 (25% solely for failure to reverse earlier).

Thus the decision of the Courts below is in conflict with British and Canadian law as well as with the United States precedents. The guidance of this Court in this still novel field of proportionate fault is imperatively required not only to avoid injustice in the present case, but also to point the way in the increasing number of proportionate fault cases sure to arise in connection with future development of international trade on the Great Lakes.

**2. A vital Rule of the United States Coast Guard, that signals arranging passing must be completed before the vessels are within one-half mile is in effect abrogated by the refusal of the Courts below to hold the Pioneer in fault for not even sighting the Wallschiff until the vessels were "about a half mile" apart.**

Coast Guard Pilot Rule 90.4 required that the downbound Pioneer's passing signal be sounded when the vessels were sufficiently far apart so that the Wallschiff could answer and agreement be reached "before the vessels approach within half a mile of each other" (33 C. F. R. § 90.4). This safety requirement of the Coast Guard, of the very type held valid by this Court in *Postal S. S. Corp. v. El Isleo*, 308 U. S. 378, was in effect invalidated by refusal of the Courts below to hold the Pioneer at fault for failing even to observe the presence of the oncoming Wallschiff until the vessels were only half a mile apart, a distance they would close at their combined speeds in just a little over one minute.

In addition to invalidating this vital Coast Guard Safety regulation, this decision is clearly in conflict with the long-standing Rules established by this Court and by the Courts of Appeals in other Circuits.

> "The duty of the lookout is of the *highest importance*. * * * It is the duty of all courts, charged with the administration of this branch of our jurisprudence, to give it the *fullest effect* * * *." *The Ariadne*, 80 U. S. 475, 478.
>
> "Considering the darkness of the night, her rate of speed, which was fifteen miles an hour past the land, the narrowness of the channel, and the probability of meeting other vessels, the *greatest watchfulness* was required * * *." *The Oregon*, 158 U. S. 186, 193.
>
> *First Circuit:* "It is a *primary rule* of navigation that all moving vessels shall maintain a careful and

efficient lookout." *Dahlmer* v. *Bay State Dredging & C. Co.*, 26 F. 2d 603, 605.

*Second Circuit:* "* * * she was confessedly guilty of a *very grave fault*, navigating without a lookout * * *." *The Anna W.*, 201 Fed. 58, 62.

*Third Circuit:* "'For an officer to leave his vessel entirely without a lookout, especially when another vessel is known to be in the vicinity, is *culpable negligence*, and approaches very nearly the line of reckless navigation.'" *U. S.* v. *Delaware Bay & R. P. Assn.*, 44 F. 2d 1, 3.

*Fourth Circuit:* "'*The fundamental rule* of the admiralty is that a vigilant lookout must be kept on all vessels * * *.'" *The Curtis Bay Towing Co.* v. *Sadowski*, 247 F. 2d 422, 425.

*Ninth Circuit:* "The failure of officers whose duties are to keep a lookout to see what they ought to have seen, or to hear what they ought to have heard, where casualty results, is a *grevious fault* * * *." *Union S. S. Co.* v. *Latz*, 223 Fed. 402, 411.

"* * * The maintenance of an adequate lookout is of the *highest importance* and is *strictly enforced* by the courts." Griffin on Collision, p. 263.

(Emphasis added in all of the foregoing quotations)

**3. Summary of reasons for granting the writ.**

This case is one of first impression in that this Court has not yet passed on the principles governing application of the Canadian proportional fault rule. The case involves conflict with long-standing safety of navigation Rules laid down by this Court, by Congress, and by the United States Coast Guard, conflict with decisions of Courts of Appeals of other Circuits, and conflict with the apportionment of fault in British and Canadian courts. It is of great public

importance in view of the anticipated increase of navigation in the Great Lakes resulting from the advent of the St. Lawrence Seaway.

## CONCLUSION

For the foregoing reasons, petitioners respectfully pray that their petition for a writ of certiorari be granted.

June 21, 1961.

Respectfully submitted,

MacDonald Deming,
*Counsel for Petitioner,*
*Partenreederei "Wallschiff"*

Richard F. Shaw,
*Counsel for Petitioners,*
*American Seating Company, et al*

Richard G. Ashworth,
Donald M. Waesche, Jr.,
*Of Counsel.*

## Appendix A

# United States District Court

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

| | |
|---|---|
| PARTENREDEREI "WALLSCHIFF", owner of the M V WALLSCHIFF,<br>*Libelant,*<br>*vs.*<br>STEAMER PIONEER, her engines, etc., and THE CLEVELAND-CLIFFS IRON CO., owner of the Steamer Pioneer,<br>*Respondents.* | In Admiralty No. 13,101 |
| THE CLEVELAND-CLIFFS IRON CO., as chartered owner and operator of the Steamer Pioneer,<br>*Cross-Libelant,*<br>*and*<br>M V WALLSCHIFF, her engines, etc.,<br>*Cross-Respondent.* | |
| AMERICAN SEATING COMPANY, ET AL.,<br>*Libelants,*<br>*vs.*<br>STEAMER PIONEER, her engines, etc.,<br>*Respondents.* | In Admiralty No. 13,540 |

### Opinion

On October 2, 1953, at about 11:00 P. M., a German motorship, the Wallschiff, and the Steamer Pioneer came into collision on the Canadian side of the St. Clair River,

opposite the City of Port Huron, Michigan. Both ships were damaged, and the Wallschiff was sunk.

The Pioneer, a conventional Great Lakes ore carrier, with an overall length of five hundred feet and a cargo of nine thousand tons of iron ore, was down-bound in the river. The Wallschiff, with an overall length of two hundred and five feet and a gross tonnage of eight hundred and eighty-eight tons was up-bound on her maiden voyage through the St. Clair River. Captain Timothy O'Leary, sixty-three years old, was master of the Pioneer and had sailed the Great Lakes for approximately forty-three years. He obtained his pilot's license in 1921 and his master's license in 1925 or 1926. He had been in command of Great Lakes vessels for about thirteen years prior to the occurrence involved here. Other members of the Pioneer's crew who were sworn as witnesses were for the most part experienced sailors. The Wallschiff crew consisted of Captain Harold Patterson, designated Sailing Master or Pilot, who came on board at Kingston, Ontario. Captain Patterson, 73 years of age, was a retired Canadian Great Lakes Captain. The members of the crew were German nationals of varying ages, but relatively young on the average. The wheelsman on duty at the time was fifteen years of age with a few months of experience as a sailor. None of the crew of the Wallschiff, except the Canadian pilot, had ever been in the St. Clair river previous to the night of the collision. The collision occurred some time around 11:00 P. M. The Canadian pilot died during the events involved in the collision. The cause of his death was given as coronary thrombosis (with death occurring immediately at its onset) with an additional contributing cause specified in the death certificate as, "exertion anxiety—was aboard ship in collision". Only two of the German crew spoke English. Orders of the Canadian pilot, given in English, were translated by

the Wallschiff's captain and transmitted in German to the respective members of the crew.

The crews of the respective vessels gave accounts of the collision which were in sharp dispute. Memb of the Wallschiff crew, whose depositions were taken before their return to Germany, testified that the Wallschiff was proceeding upstream and had received a one-blast passing signal from the downbound Pioneer, which they construed to indicate the Pioneer's election of a port-to-port passage. The Wallschiff's captain, supported by some members of his crew, testified that he replied to the signal with one blast, and in conformity therewith directed his boat to accomplish a port-to-port passage; that shortly before the collision, the Pioneer suddenly changed its course from starboard sharply to port and was heading for the Canadian shore; that the Wallschiff, then also proceeding toward the Canadian shore, vainly tried to avoid collision by reversing its engines and going hard to starboard, but was rammed by the Pioneer.

The Pioneer's crew, supported by a substantial number of disinterested witnesses, gave a strikingly contrary account of the events which preceded the collision. When still above the Blue Water Bridge, Captain O'Leary, Master of the Pioneer, saw a green light blink out on a boat that appeared to be bedding down at the Water Works dock on the Port Huron shore of the river. This would be a considerable distance south, or downstream. He intimated that this light was probably on the Wallschiff. His first certain view of the Wallschiff was when he was about one-half mile from it. It was then coming upstream close to the American shore, approximately one hundred feet therefrom, and in such a position that he considered a port-to-port passing, which was usual in that part of the river, impracticable. He gave a two-blast signal, exercising his right of election as the down-bound boat to choose a starboard-to-starboard pass-

ing, and directed his course to port. His first signal was unanswered by the Wallschiff and after a thirty second interval, he gave a danger signal followed by a second two-blast. During this time the Wallschiff continued on a parallel course close to the American shore, and the Pioneer continued on a port course, but all of its signals remained unanswered. After the second two-blast signal, the Wallschiff suddenly changed its course to starboard and proceeded at about a forty-five degree angle directly across the course of the Pioneer, in such a manner as to make it impossible for the Pioneer to avoid it. The collision occurred somewhere south of midstream in Canadian waters.

After the collision, the Pioneer kept its bow in the side of the Wallschiff to prevent it from sinking in midstream, and pushed it toward the Canadian shore. Contact was broken shortly before the Wallschiff sank, close to the Canadian shore.

This Court's conclusions as to which of these accounts is the truth will be discussed hereinafter.

This action was commenced by the Partenreederei Wallschiff, owner of the Wallschiff, against the Pioneer and its owner, the Cleveland Cliffs Iron Company. The parties will hereinafter be referred to as the Pioneer and the Wallschiff. A cross libel was filed by the Pioneer against the Wallschiff. A second action was commenced by the American Seating Company and its underwriters against the Pioneer for loss of the Wallschiff's cargo, owned by the Seating Company. Trial was had to determine liability, it being suggested by counsel for all parties that when liability became fixed, the matter of the amount of damages involved could probably be agreed upon. No evidence was introduced on the question of extent of damages. Both ships, however, were damaged in the collision and the cargo of the Wallschiff was either lost or damaged. Pleadings asserted that the Wall-

schiff's damages amounted to $500,000; the Pioneer's damage was alleged to be $50,000, and the cargo loss was put at $50,000.

At the conclusion of proofs, all parties conceded that the collision occurred in Canadian waters, and that liability should be determined in accordance with the Canada Shipping Act of 1934, Section 640, Chapter 44, and the Brussels Convention of 1910. Counsel likewise conceded that on the questions of due care and negligence and the applicable Rules of Navigation, the law of Canada is substantially the same as the law of the United States. It was recognized, also, that if the Court should find mutual liability, damages would be apportioned according to the above Canadian law and the Brussels Convention.

The Court is satisfied from all of the evidence that the principal and major fault in this case was that of the Wallschiff. Aside from the weight, or lack of it, which this Court finds in the conflicting evidence of the members of the respective crews, the Court is greatly helped by the testimony of disinterested eye witnesses along the Michigan shore who had an opportunity to observe the movement of the boats in question and to hear the signals given during the time the boats were approaching each other prior to and at the time of the collision. Not all of the outside witnesses corroborated the testimony of the crew of the Pioneer. A witness who was on the porch of the Westcott Marine Reporter Station on the Port Huron shore, and a witness who was on the Canadian shore gave testimony which tended to support the account of the crew of the German boat. The Court is satisfied, however, that the record will fully justify his conclusion that they lacked sufficient credibility to seriously detract from the weight the Court is giving to the other disinterestd witnesses. There are discrepancies as to time, distances and other details between the account of the various disinterested witnesses produced by the Pioneer.

but in the main, their testimony heavily supports the broad picture of the events as given by the members of the crew of the Pioneer and its master. From testimony in the case, the Court finds the following facts:

1) At a time when the Pioneer was over one-half mile upstream from the Wallschiff, the Pioneer's master observed the Wallschiff coming upstream close to and about one hundred feet from the American shore. Observing the Wallschiff's position, the downbound Pioneer exercised its right of election to make a starboard-to-starboard passage. The Court finds that Captain O'Leary was justified in his conclusion that in view of the then position of the Wallschiff, it would be more practical and safer to go to port rather than to come in close to the American shore to pass; that while still better than one-half mile away, the captain sounded a two-blast passing signal. The Pioneer got no response from the Wallschiff, but the Wallschiff continued its parallel course along the American shore.

2) After the lapse of about thirty seconds following the first two-blast signal, receiving no response from the Wallschiff, the Pioneer blew a danger signal for the purpose, as its captain said, of alerting or waking up the master of the Wallschiff. No response was then received from the Wallschiff and the danger signal was followed by a second two-blast signal. Following, or at about the time of, the second two-blast signal the Wallschiff suddenly swung to starboard and headed across the river at about a 45 degree angle. At that time, about twelve hundred feet separated the boats. The Pioneer had been continuing its course to port and when the Wallschiff changed its course, swung hard over to port.

3) The Pioneer did not reduce its speed, reverse its engines or change its wheel from port until it was approxi-

mately 200 feet from the Wallschiff, at which time the wheel was put amidships and the engines were reversed. This, however, made no appreciable change in the direction or speed of the Pioneer and it struck the Wallschiff aft of midship, the angle of the collision being approximately ninety degrees. The speed of the Pioneer was about eleven and one half miles an hour, the down current about five miles an hour, and the Wallschiff was moving about eight miles an hour against the current.

In weighing the evidence of the members of the crew of the Wallschiff against the evidence opposed to it, including the evidence of disinterested witnesses, the Court has taken into consideration the following things disclosed by what was said in the depositions of the members of the Wall-chiff crew.

At the time of the occurrence, neither the wheelsman, Schulz, nor a sailor who was standing watch at the time could understand a command given in English. Any command made by Captain Patterson was in English. Any directions given by Captain Patterson would be given in English and then translated either by the master, Thomas Nissen, or the Mate of the Wallschiff. The first time the master of the Wallschiff saw the Pioneer was ,when the ships were a quarter of a mile apart, with the Pioneer showing a red, or port, running light. He stated that later the red port light of the Pioneer disappeared; he then saw its green light, indicating that the Pioneer had changed course. While not certain of the distance, he indicated that this happened when the boats were two or three hundred feet apart. He said he sounded a three-blast signal when the boats were from fifty to one hundred feet apart. At that time he put his engines full speed astern and the wheel hard right. The Wallschiff's master testified that when he first heard a one-blast signal from the Pioneer,

the Wallschiff was heading on a light on the American side. He said it was the light that was the most far to the American side, a light on the Blue Water bridge. He had never approached the Blue Water bridge before.

The third mate of the Wallschiff was Herman Vahsling. He was on watch at the time of the occurrence in question. He testified that just before the vessels collided, the Captain ordered him to go into the chart room to get a new chart; the one up to then in use was run off and they needed a new chart. Apparently, he was working on getting this new chart, and perhaps had completed it when the collision occurred. He did not hear any signals given, either by his own boat or the Pioneer. He testified that the pilot, Captain Patterson, was standing on the bridge when he left to go to the chart room, but when he returned the pilot was gone and he never saw him again. There is some uncertainty in this witness' testimony as to the changing of the chart, and whether the pilot and captain had examined the new one prior to the collision. They would have to go from the bridge into a separate and enclosed room to study the chart.

The machinist's assistant, Manfried Lohrbeer, was standing watch with the first engineer, at the time of the collision. He was twenty-one years old. Prior to this he had sailed about six months and had been on the Wallschiff a little over a month. Heinz Werner Schulz who was acting as wheelsman on the Wallschiff at the time of the collision, was fifteen years old and had been sailing about five months. The Wallschiff was the first boat he had ever sailed on. His ordinary duties were cleaning in the mess hall, painting, sweeping and sometimes acting as wheelsman. At the time of the events involved here he was acting as lookout and was steering the vessel. When asked whether he remembered any whistles from the Wallschiff just before

the collision, he stated he could not say for sure, he had heard several but could not say where they came from. Orders from the pilot to the captain were translated by the captain and then given to the wheelsman. He did recall an order to put the wheel hard starboard, just before the collision. When asked if he had seen any lights ahead just before the collision, he said he saw a lot of lights ahead. He was asked whether at any time he heard Klein report to the captain that any other vessel was anywhere around, he said he did not; and he did not hear the captain say anything about the presence of any other vessel. He did not say that he heard nothing, but merely that he couldn't listen to someone else while he was steering. He discussed various lights he had seen as they were coming up the river, approaching the scene of the collision. He stated that he steered according to orders received from the captain and upon being asked whether the pilot or the captain pointed out the particular light on which he would steer, he stated he selected the light himself. He stated he did not see the Pioneer at any time before the collision; that he did not see the Pioneer even immediately before it came into the side of the Wallschiff.

The witness Hans Klein was acting as lookout at the time of the collision. He was 27 years old. He testified he heard signals from the Pioneer, but described them as one-blast signals. He testified he saw lights of the approaching Pioneer; that he first saw a red light and then a few white lights, then he heard one short blast. He described the Pioneer as turning very slowly toward them, and as the Pioneer came close, he noticed for a short time red and green lights. As it came closer, he noticed only green lights. He described the Pioneer's turn to port as at first very slowly, then as he noticed the red and green lights, the turn was faster. He could not tell how long he could see the red

light of the Pioneer after he first saw it. His station was on the port side and he would have to look across the ship to see the lights on the right hand side. He stated there were white lights all along the length of the Pioneer. He could not say how far away the Pioneer was when he first saw it, he said he would have to guess, it was not close at the beginning. He stated he first saw the red light on the Pioneer and he continued to see it for several minutes, but was not sure of the time. He said, "I saw the red light and then the white lights which became shorter and shorter all of the time, which would indicate that it was swinging." He testified that when he first noticed the Pioneer and heard the one-blast signal, the captain immediately ran inside and answered with a one-blast signal. He stated he did not give a report to the master when he first saw the Pioneer and heard the whistle. Asked if he made any report to the master when he saw the Pioneer, or if he discussed the general situation from that time to the collision, he stated, "I cursed like the dickens when I noticed him coming so close. That's all I did."

There is confusion in the testimony as to the action of the Wallschiff's Canadian pilot. He was seen to fall down at or about the time of the collision. The captain of the Wallschiff stated that the Canadian pilot had given the order to answer the original one-blast signal, and at the same time ordered the wheelsman to go easy starboard. This was, however, before the green light was seen indicating the claimed change in the course of the Pioneer. After this change of course by the Pioneer, the pilot apparently took no part in the navigation of the ship and, presumably, the captain was in command after that. The pilot died from a heart attack. Counsel for the Pioneer urged the Court to attach significance to the manner and time of his death, as bearing upon the conduct of the Wallschiff. This Court,

however, finds it unnecessary to do so, and believes it would be unsafe to speculate on the subject. However, a fair reading of the testimony of the Wallschiff crew strongly suggests the existence of some degree of confusion on the Wallschiff at the time of its approach to, and attempted passing of, the Pioneer.

Witnesses, not members of the crew, presumably disinterested, corroborated the testimony of the master of the Pioneer that the Wallschiff was coming upstream close to the American shore and about one hundred feet therefrom. They described the Pioneer coming under the Blue Water Bridge, pretty well in the center of the river. They corroborated the master of the Pioneer as to the location of his boat and the Wallschiff and as to the giving of signals.

These witnesses and their location at the time of the events involved were as follows: George Ashton, an employee of the City of Port Huron, was standing in the door of the pump house at the Port Huron Water Works, and observed the Wallschiff pass close to the Water Works dock. John C. Diller, who had served eight years in the Navy, on the night of the casualty was on the porch of the Westcott Marine Reporting office on the river bank and had a very clear view of the scene of the accident. George E. Cray, whose home was on the river bank, near the Westcott Marine Reporting office, likewise had a rather clear view of the river and described the events of the collision. Thomas E. Robinson was an employee of the Peerless Cement Company which is on the St. Clair River just below the Blue Water bridge. He observed the action of the Pioneer and Wallschiff at various times as they approached the collision. Mr. and Mrs. Wilson Montgomery observed the Wallschiff from their home which was close to the river bank. Their home was some distance below the Port Huron Water Works Park. They were concerned for their

sail boat, which was moored opposite their house, when the Wallschiff went by very close to shore.

There are discrepancies between the witnesses as to the lights on the Wallschiff. The master of the Pioneer testified he did not see any running lights on the Wallschiff, although some members of the crew indicated that they did. Another witness saw only its range lights, that are on the fore and aft mast. As to the distance the Pioneer was when they blew the first blast, there are varying statements of its location at that time, but they all did indicate that the Pioneer was coming under, or coming out from under, the Blue Water bridge. This would corroborate the master's testimony that he was more than one-half mile away from the Wallschiff when he blew his first passing signal. On cross-examination, the attention of the Pioneer's master was called to some marks he had, at the Coast Guard investigation, placed on a chart to indicate the location of his boat and the Wallschiff at the time of giving the signal. Scaling these would indicate a distance less than one-half mile, or approximately 2300 feet. The Court is not impressed that these marks should conclusively control his estimate or seriously detract from the weight of the testimony of the captain.

This collision occurred at night, the events occurred rapidly and the Court would be surprised if there were not discrepancies between the accounts given by various witnesses whose opportunities to observe were from different vantage points, and whose recollections contained the variances which always occur in human memories. The Court finds that the collision was caused primarily by the conduct of the Wallschiff. Its action in turning suddenly to cross the river was described by various witnesses as a "sheer" and expert testimony was given to indicate that this could have been brought about by the action of the boat

being too close to the shore, causing it to sheer sharply into the river. This was referred to as shore suction. Whatever may have been the true situation aboard the Wallschiff, the Court is satisfied that it was not being navigated with the care that the situation at hand called for.

One thing is quite significant. The master of the Wallschiff testified that his boat was coming upstream on the Canadian side of the river. This is directly contrary to the testimony of the disinterested witnesses, referred to above, and indicates that the master of the Wallschiff was not aware of where he really was as he approached the Pioneer.

The Court, however, must now proceed to determine whether or not the Pioneer's master was guilty of some infraction of the rules of navigation which in any degree contributed to the collision from which this litigation arises. There was considerable testimony about what the members of the crew of the Pioneer saw or did not see prior to the time its master observed the location of the Wallschiff and gave a two-blast signal. It is not important to review this evidence because the Court finds that the evidence clearly establishes that at a time when the Pioneer was slightly more than one-half mile away from the Wallschiff, its master was aware of the presence and the location of the Wallschiff in the river. There was then ample time for a perfectly safe and normal passage if both boats obeyed the rules of navigation. From the time the Pioneer observed the Wallschiff until the time of its sudden and inexcusable sheering across the river, the Pioneer was proceeding normally, pursuant to its election to make a starboard-to-starboard passage. The collision could not have occurred had the Wallschiff continued on the course it was proceeding on when it first received the two-blast passing signal and had it given any heed to such signal, to the danger signal or to the second two-blast signal. In addition to the signal, which

it must be charged with having heard, the Wallschiff was in no way prevented from seeing the larger boat, the Pioneer, with its mast lights, running lights, and long string of deck lights, that are peculiar to the Great Lakes ore carriers. No satisfactory explanation was given by any of the libelant's witnesses for the failure to have made a clear and timely observation of the Pioneer. The fault, therefore, of the Wallschiff was grave and inexcusable.

A more difficult question, however, is presented by the charge that notwithstanding the negligence of the Wallschiff, the Pioneer's master was guilty of a statutory violation which should be held to have contributed, in some degree, to the casualty.

It has been assumed by both counsel that the Rules of Navigation of the Great Lakes as found in the United States Code, when the Great Lakes Pilot Rules (Libelant's Exhibit 3) apply to the conduct of both vessels and that in any event, the laws of Canada and its regulations are identical with the mentioned American rules.

Rule 24 (33 USCA § 289) provides:

> "In all narrow channels where there is a current, and in the rivers * * * St. Clair * * * when two steamers are meeting, the descending steamer shall have the right of way and shall, before the vessels shall have arrived within a distance of one-half mile of each other, give the necessary signal to indicate which side she elects to take."

The Pioneer had this right of election and, as the Court finds, properly exercised it.

Rule 26 (33 USCA § 291) provides:

> "If the Pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of

> one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the Pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other, both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse."

If the Pioneer's master was in doubt, or should have been in doubt, as to the course or intention of the approaching Wallschiff, at any time when he still could have, by effective compliance with the foregoing rule, avoided the collision, he should have done what the rule requires to be done; and his failure so to do must charge him with some share, however slight, of the responsibility for its happening.

Captain O'Leary testified that when more than one-half mile away from the Wallschiff, he sounded his two-blast signal. He testified that he got no response to such signal. He then waited for thirty seconds during which time he remained on his port course and continued at full speed. After this wait without responsive signal, he blew a danger signal for the purpose, as he testified, of "waking up" the master of the Wallschiff. There was still no response from the Wallschiff, and it continued on its course parallel with the American side. O'Leary then sounded a second two-blast signal, still continuing, however, at full speed; at this juncture, the Wallschiff made its abrupt swing and headed across the Pioneer's bow. The Pioneer's master then went hard to port and continued his speed, believing such was the safest action to take. When he was within two hundred

feet of the Wallschiff, he reversed his engines and put his wheel amidships. This Court does not believe that there was any negligence or fault in what the master of the Pioneer did, or failed to do, from the time that the Wallschiff started its abrupt course to its starboard, even though upon reflection he or others might conclude that some other method would have been a better course. Neither does the Court find contributory fault in the failure of the Pioneer to drop its anchors. From the Court's own impressions as to the function of anchors, and from opinions expressed at the trial by veteran mariners, the Court's conclusion is that good seamanship would not have been served by dropping the Pioneer's anchors in the fast moving events which preceded the collision.

This Court, however, is of the opinion that the silence of the Wallschiff upon receiving the first two-blast signal from the Pioneer should have placed the master of the Pioneer in some doubt. It was not necessary for him to immediately upon failure to get a responsive signal, reverse his engines and reduce his speed. It cannot be said with mathematical nicety how many seconds a captain should wait for an answering signal. Thirty seconds, however, without action, followed by a danger signal, still without action and without full assurance of a safe passage, persuades this Court that he cannot completely exonerate Captain O'Leary of fault. The speed at which the distance between the boats was being shortened was likewise reducing the opportunity of the captain to meet the emergency, however sudden, which did, indeed arise.

It is true that he testified that he was not alarmed at the lack of responsive signal because the Wallschiff was continuing on a course that would have permitted safe passage. However, some doubt is evidenced by the fact of his blowing a danger signal, and his desire to "wake up"

the Wallschiff's pilot. By so doing, he did indicate concern that the Wallschiff's master was confused or inattentive. The Court cannot say that if the master of the Pioneer had been earlier concerned and had taken steps to reduce the speed of his vessel, the collision would nevertheless have occurred.

Experienced lake captains gave expert testimony concerning the conduct of the master of the Pioneer and expressed their belief that what he did was in keeping with good seamanship and that in like circumstances, they would probably have done as he did. The Court was impressed with the truthfulness and the sincerity of these old time mariners. However, the Rules of Navigation are rules of conduct, distilled no doubt from the experience and judgment of those who have sailed the inland and ocean waters through the years of modern navigation. Believing that a described course of conduct gives strong assurance of safety under given circumstances, such conduct has been enjoined on all by rules of law. It is not for a master, or for experts, to say that in certain circumstances it is good seamanship to disregard these rules.

The rule enunciated in *The New York, 175 U. S. 187*, is applicable to the conduct of the master of the Pioneer in the case at Bar. In that case, the steamer Conemaugh had given a signal indicating the course she intended to follow. No reply came from the approaching steamer New York. At a time when these boats were still three quarters of a mile apart, a second blast went unanswered. A third signal was given. The Supreme Court, in finding fault on the part of the Conemaugh, said, at page 201:

> "The New York made no answer to this third signal. The duty of the Conemaugh at this juncture was plain. She should have stopped her engines after the second signal, and, if necessary to bring her to a

> complete standstill, have reversed them. Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty."

It might be contended that the above case is distinguishable because of the repeated signals that were unanswered. However, the rules involved do not specify the number of signals that shall be given. On the evidence before it, this Court cannot say that had the master of the Pioneer reduced the speed of his ship at the time when he should have been in doubt as to the Wallschiff's course, that this collision would nevertheless have occurred or that the collision would have been as severe as it was.

No doubt in the everyday handling of boats, masters of vessels wait the interval that Captain O'Leary waited in this instance without untoward results. When, however, disaster does follow, we must look to see whether or not a rule should have been observed and whether failure of its observance contributed to a collision.

In the case of *A. H. Bull S. S. Co. vs. United States*, *34F (2) 614*, (*CCA 2*) there is discussed at page 616 the duty of a master to begin promptly his action upon failure of a responding signal:

> "But her duty began before. Her signal had not been answered, and she could not in the nature of things know what the Chinook proposed to do. Under such circumstances, a master is bound to stop his way. * * * There is no more important rule, since vessels, though not quite dead, will so reduce their speed that the collision, if it occurs, will be insignificant, as certainly would have been the case here.

> Had the Clare done her duty shortly after her first signal—that is, as soon as she was in doubt as to the Chinook's navigation—this collision would not have happened. If she had done it as soon as the Chinook began to swing upon her course, it probably would not have happened. * * * masters who choose to divine the purposes of other vessels and keep on, may avoid the charge of overcaution, but they take their chances." See also *U. S.* vs. *Grant*, 11 F(2) 700; *The Menaires*, 1 F(2) 13.

This Court is not impressed, however, that the Pioneer's fault was at all of the character or gravity of that of the Wallschiff, but it cannot be eliminated entirely. Some Court might find that the Pioneer's fault was so minimal and the Wallschiff's so gross as to cast the entire burden of fault upon the Wallschiff. With the opportunity here to apportion damages, this Court does not feel that it should do so. It is, accordingly, this Court's opinion that negligence of the libelant and the libelee should be apportioned, and the Court finds that the Pioneer should be, and is, charged with five percent of the negligence and the Wallschiff with ninety-five percent thereof. Damages, when they are ascertained, shall be apportioned accordingly.

If the American rule had to be applied in this case, with equal division of the damages, this Court might, indeed, imitate many of its predecessors and seek to avoid injustice by excusing the Pioneer under the major-minor fault doctrine. Being constrained to find that there was some violation of Rule 29, supra, by the Pioneer's master, this Court is grateful for the circumstances that this collision happened in Canadian waters.

The Court assumes that if the parties can agree upon the amount of damages, an appropriate decree may be en-

tered in conformance with this opinion. If agreement cannot be reached as to damages, testimony on this question will be taken either by this Court or by its commissioner.

/s/ CLIFFORD O'SULLIVAN
United States District Judge

Dated: Detroit, Michigan
May 21st, A. D., 1958

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | |
|---|---|
| PARTENREEDEREI "WALLSCHIFF", owner of the M V WALLSCHIFF,<br>*Libelant,*<br>*vs.*<br>STEAMER PIONEER, her engines, etc., and THE CLEVELAND CLIFFS IRON CO., owner of the Steamer Pioneer,<br>*Respondents.* | In Admiralty No. 13,191 |
| THE CLEVELAND-CLIFFS IRON CO., as chartered owner and operator of the Steamer Pioneer,<br>*Cross-Libelant,*<br>*vs.*<br>M/V WALLSCHIFF, her engines, etc.,<br>*Cross-Respondent.* | |
| AMERICAN SEATING COMPANY, ET AL.,<br>*Libelants,*<br>*vs.*<br>STEAMER PIONEER, her engines, etc.,<br>*Respondents.* | In Admiralty No. 13,549 |

**Findings of Fact and Conclusions of Law**

This Court makes the following Findings of Fact and Conclusions of Law in the above causes:

FINDINGS OF FACT

1) The libelant, Partenreederei "Wallschiff" at all times material to the issues herein, was the owner of the Wall-

schiff, a motor vessel of German registry with an overall length of two hundred five feet and a gross tonnage of eight hundred and eighty-eight tons.

2) The respondent and cross-libelant, The Cleveland-Cliffs Iron Company, at all times material to the issues herein, was the chartered owner and operator of the Steamer Pioneer, a conventional Great Lakes ore carrier, with an overall length of approximately five hundred feet.

3) At about 11:00 P.M. on October 2, 1953, the Pioneer, which was downbound in the St. Clair River with a cargo of nine thousand tons of iron ore, came into collision with the upbound Wallschiff, which was laden with a partial cargo of steel sheets. The collision, which occurred on the Canadian side of the river opposite the City of Port Huron, Michigan, resulted in damage to both vessels, the sinking of the Wallschiff and damage to her cargo.

4) The Master of the Pioneer was sixty-three years old, had sailed the Great Lakes for approximately forty-three years and had been in command of Great Lakes vessels for approximately thirteen years prior to the accident here involved. Other members of the Pioneer's crew were, for the most part, experienced sailors.

5. The members of the Wallschiff crew were relatively young on the average, including a fifteen year old wheelsman, and only two of the crew understood and spoke English. The pilot on the Wallschiff was a seventy-three year old, retired Canadian Great Lakes Captain. None of the crew of the Wallschiff except the pilot had been in the St. Clair River prior to the night of the collision and the orders of the pilot, given in English, were translated by the Wallschiff's Captain and transmitted in German to the respec-

tive members of the crew. The Canadian pilot died during the events involved in the collision. The cause of death was coronary thrombosis (with death occurring immediately at its onset) with an additional contributory cause specified in the death certificate as "exertion anxiety—was aboard ship in collision".

6) The accounts of the collision given by the crews of the respective vessels are in sharp dispute. The account given by the crew of the Pioneer is supported in all of its important details by a substantial number of disinterested shore witnesses. These witnesses were located at various vantage points on the American shore from a point some distance below the Port Huron Water Works Park up to and including the Peerless Cement Company plant, which is located just below the Blue Water Bridge.

7) At a time when the Pioneer was one-half mile or more upstream from the Wallschiff, the Pioneer's Master observed the Wallschiff coming upstream to and about one hundred feet from the American shore. The downbound Pioneer, when well within the required distance, exercised its right of election to make a starboard-to-starboard passage and sounded a two-blast passing signal to the upbound Wallschiff. The Pioneer got no response from the Wallschiff, and the Wallschiff continued its parallel course along the American shore.

8) In view of the relative positions of the two vessels at the time of the sounding of the two-blast passing signal, the Master of the Pioneer was justified in requesting a starboard-to-starboard passage, rather than attempting to pass between the Wallschiff and the American shore.

9) After a lapse of about thirty seconds following the first two-blast signal, the Pioneer, in the absence of a response from the Wallschiff, sounded a danger signal for

the purpose of alerting or waking up the Master of the Wallschiff. The danger signal was followed by a second two-blast signal. At about the time of the sounding of the second two-blast signal and when a distance of approximately twelve hundred feet separated the boats, the Wallschiff suddenly and without warning swung or sheered to starboard and headed across the river at about a forty-five degree angle. The Pioneer had been continuing its course to port and, when the Wallschiff changed her course, swung hard over to port.

10) The Pioneer did not reduce her speed, reverse her engines, or change her wheel from hard aport until she was approximately two hundred feet from the Wallschiff, at which time the wheel was put amidships and the engines were reversed. This, however, made no appreciable change in the speed of the Pioneer and she struck the Wallschiff aft of amidships, the angle of collision being approximately ninety degrees. The strength of the current in the section of the river concerned was five miles per hour, southward. The speed of the Pioneer was about eleven and one-half miles per hour through the water, or sixteen and one-half miles per hour over the ground. The Wallschiff had been proceeding at about thirteen miles per hour through the water and, going against the current at over-the-ground speed of approximately eight miles per hour.

11) At the time of the approach to and attempted passing of the Pioneer, there was some degree of confusion on the Wallschiff. Although the Master of the Wallschiff testified that his boat was coming upstream on the Canadian side of the river, this is directly contrary to the testimony of the disinterested witnesses and indicates that he was not aware of where the Wallschiff was as she approached the Pioneer. The testimony of the Pioneer's witnesses, as supported by the testimony of the outside disin-

terested witnesses, as to the location and navigation of the Wallschiff is more plausible and reliable.

12) Prior to crossing the river at a forty-five degree angle, the Wallschiff was navigating close to and parallel with the American shore. From the time the Pioneer observed the Wallschiff until the time of that vessel's sudden and inexcusable sheering across the river, both vessels were in safe position to pass if the Wallschiff had not sheered across the bow of the Pioneer. The collision could not have occurred had the Wallschiff continued on the course it was proceeding on when it first received the two-blast signal and had it given any heed to such signal, to the danger signal, or to the second two-blast signal. No satisfactory explanation is given by any of the Wallschiff witnesses for their failure to make a clear and timely observation of the Pioneer.

13) The Pioneer was not guilty of negligence or fault in what the Master of that vessel did, or failed to do, from the time the Wallschiff started its abrupt course to its starboard, nor is the Pioneer guilty of contributory fault because of the failure to drop its anchors.

14) This Court, however, is of the opinion that the silence of the Wallschiff upon receiving the first two-blast signal from the Pioneer should have placed the Master of the Pioneer in some doubt. It was not necessary for him to immediately, upon failure to get a responsive signal, reverse his engines and reduce his speed. It cannot be said with mathematical nicety how many seconds a Captain should wait for an answering signal. Thirty seconds, however, without action followed by a danger signal, still without action and without full assurance of a safe passage, persuades this Court that he cannot completely exonerate Captain O'Leary of fault. The speed at which the distance

between the boats was being shortened was likewise reducing the opportunity of the captain to meet the emergency, however sudden, which did indeed arise. It is true that he testified that he was not alarmed at the lack of responsive signal because the Wallschiff was continuing on a course that would have permitted safe passage. However, some doubt is evidenced by the fact of his blowing a danger signal, and his desire to "wake up" the Wallschiff's pilot. By so doing, he did indicate concern that the Wallschiff's Master was confused or inattentive. The Court cannot say that if the Master of the Pioneer had been earlier concerned and had taken steps to reduce the speed of his vessel, the collision would nevertheless have occurred.

15) The Wallschiff was not being navigated with the care that the situation at hand called for and the collision was caused, primarily, by the conduct of the Wallschiff. The faults of the Wallschiff were so gross that, under the comparative negligence rule, she is chargeable with and responsible for ninety-five percent of the total provable damages sustained by both vessels. The Pioneer's fault was not at all of the character or gravity of that of the Wallschiff, and, under the same rule of negligence, she is chargeable with and responsible for five percent of the total provable damages sustained by both vessels.

16) The Rules of Navigation of the Great Lakes, as found in the United States Code and the Great Lakes Pilot Rules, apply to the conduct of both vessels. The laws and regulations of the Dominion of Canada relating to the navigation of vessels are identical with the above mentioned American rules.

17) Rule 26 (33 U. S. C. A. 291) provides, in substance, that if the pilot of one vessel fails to understand the course or intention of an approaching steamer, the pilot

so indicate shall sound several short, rapid blasts of the whistle; and, if the vessels shall have approached within a half mile of each other, both shall reduce their speed to bare steerageway and, if necessary, stop and reverse.

## Conclusions of Law

1. The collision was due primarily, to the faults of the M V Wallschiff, which were major and inexcusable.

2. The fault of the Steamer Pioneer was minor and contributed in only a slight degree to the collision.

3. The collision occurred in Canadian waters, and liability is to be determined in accordance with the doctrine of comparative negligence set forth in the Canada Shipping Act of 1934, Section 640, Chapter 44, and the Brussels Convention of 1910, and the damages are to be apportioned.

4. The collision having been occasioned by the faults of both vessels, the damages arising therefrom, including damage to cargo, shall be borne to the extent of ninety-five percent by the owners of the M V Wallschiff and to the extent of five percent by the chartered owner and operator of the Steamer Pioneer.

Clifford O'Sullivan
Clifford O'Sullivan, District Judge

Dated: December 29, 1950

UNITED STATES OF AMERICA

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | |
|---|---|
| PARTENREEDEREI "WALLSCHIFF", owner of the M. V. WALLSCHIFF,<br>*Libelant,*<br>*vs.*<br>STEAMER PIONEER and CLEVELAND CLIFFS IRON CO., Owner of the Steamer PIONEER,<br>*Respondents,*<br>*and*<br>AMERICAN SEATING COMPANY AND AETNA CASUALTY & SURETY CO.,<br>*Libelants,*<br>*vs.*<br>STEAMER PIONEER AND CLEVELAND CLIFFS IRON CO.,<br>*Respondents.* | In Admiralty No. 13,101<br><br>In Admiralty No. 13,545 |

**Final Decree**

These causes coming on to be heard on the pleadings and proofs adduced by the respective parties and having been argued and submitted and the Court, after due deliberation, having handed down its Opinion and having entered its Findings of Fact and Conclusions of Law holding that the collision was due to the faults of both vessels, and that the chartered owner of the Pioneer is entitled to

recover from the owner of the Wallschiff ninety-five percent (95%) of its provable damages less five percent (5%) of the damages sustained by the owner of the Wallschiff, and that the owner of the cargo is entitled to recover five percent (5%) of its provable damages from the chartered owner and operator of the Steamer Pioneer, and

The parties herein having stipulated and agreed that the provable damages of the owner of the M V Wallschiff are in the amount of $477,904.50; the provable damages of the chartered owner and operator of the Steamer Pioneer are in the total sum of $40,405.97, and the provable damages of the owner of the cargo are in the amount of $30,434.50; it is

ORDERED, ADJUDGED AND DECREED that The Cleveland Cliffs Iron Company, as chartered owner and operator of the Steamer Pioneer, recover of and from Partenreederei "Wallschiff", as owner of the M V Wallschiff, and its surety, the sum of $20,185.94, and that American Seating Company and Aetna Casualty & Surety Co recover of and from The Cleveland Cliffs Iron Company and its surety the sum of $1,951.73, together with interest thereon at the rate of five percent (5%) per annum from the date of this decree until paid, and it is further

ORDERED that the Respondents recover their respective taxable costs from Libelant on the same basis as they are entitled to recover their damages under this decree

ORDERED that unless this decree be stayed on appeal within the time limited and prescribed by law, The Cleveland Cliffs Iron Company have execution against Partenreederei "Wallschiff" and its surety and the said American Seating Company and Aetna Casualty & Surety Co have

execution against The Cleveland Cliffs Iron Company and its surety to enforce satisfaction of this decree or so much thereof as shall remain unsatisfied.

Dated: Detroit, December 30, 1959

CLIFFORD O'SULLIVAN
United States District Judge

# UNITED STATES COURT OF APPEALS

## For the Sixth Circuit

| | |
|---|---|
| Partenreliderei "Wallschiff", owner of the M V Wallschiff, *Libelant and Cross-Claimant Appellant,* *vs.* Steamer Pioneer, her engines, etc., and The Cleveland-Cliffs Iron Company, bareboat chartered owner of the Steamer Pioneer, *Claimant-Respondent and Cross-Libelant-Appellee.* | No. 14,267 |
| And Cross-Libel | |
| American Seating Company, et al., *Libelants-Appellants,* *vs.* Steamer Pioneer, her engines, etc., and The Cleveland-Cliffs Iron Company, *Claimant-Respondent-Appellee.* | No. 14,268 |

## Order

Before: McAllister, Chief Judge, Cecil, Circuit Judge, and Boyd, District Judge.

The above cause coming on to be heard upon the record, the briefs of the parties and the arguments of counsel in open court, and it appearing that the findings of fact and conclusions of law of the District Court are clearly sup-

ported by the weight of the evidence, and the court being duly advised,

Now, therefore, it is ordered, adjudged and decreed that the judgment of the District Court be and is hereby affirmed for the reasons stated in the findings of fact, and conclusions of law, and on the opinion of Judge O'Sullivan, reported in 164 F. Supp. 421.

Approved for entry:

/s/ THOMAS F. MCALLISTER
United States Circuit Judge

Nos. 14,267-14,268

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

| | |
|---|---|
| PARTENREEDEREI "WALLSCHIFF", owner of the M/V WALLSCHIFF, *Libelant and Cross-Claimant-Appellant,* *v.* STEAMER PIONEER, her engines, etc. and THE CLEVELAND-CLIFFS IRON COMPANY, bareboat chartered owner of the STEAMER PIONEER, *Claimant-Respondent and Cross-Libelant-Appellee.* | No. 14,267 |
| AND CROSS-LIBEL AMERICAN SEATING COMPANY, ET AL., *Libelants-Appellants,* *v.* STEAMER PIONEER, her engines, etc., and THE CLEVELAND-CLIFFS IRON COMPANY, *Claimant-Respondent-Appellee.* | No. 14,268 |

**Order**

BEFORE: McALLISTER and CECIL, Circuit Judges, and BOYD, District Judge.

The above cause coming on to be heard upon appellants' petition for rehearing, or in the alternative, for a rehearing en banc, and there appearing no error in the opinion of Judge O'Sullivan rendered in the trial of the above cause

and reported in 164 F. Supp. 421, which this Court has heretofore, in effect, adopted as its opinion, and the Court being duly advised,

Now therefore, It is ORDERED, ADJUDGED and DECREED that the petition for rehearing be denied, and that the petition for rehearing en banc be denied on the authority of *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537, (C. A. 6).

Approved for entry:

s/ THOMAS F. MCALLISTER
United States Circuit Judge

# Appendix B

## THE GREAT LAKES RULES
## 33 U. S. C. §§ 241-295

AN ACT TO REGULATE NAVIGATION ON THE GREAT LAKES AND THEIR CONNECTING AND TRIBUTARY WATERS, AS AMENDED

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following rules for preventing collisions shall be followed in the navigation of all public and private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal and in the navigation of all other vessels upon such lakes and waters while within the territorial waters of the United States. (28 Stat. 645-650, as amended, 49 Stat. 669, 62 Stat. 82; and Act of March 28, 1958 (Public Law 85-350); 33 U. S. C. 241-295.)

* * * * *

REGULATIONS

SEC. 3. That the Commandant of the Coast Guard shall have authority to establish all necessary regulations, not inconsistent with the provisions of this Act, required to carry the same into effect.

The Commandant of the Coast Guard of the United States shall have authority to establish such regulations to be observed by all steam vessels in passing each other, not inconsistent with the provisions of this Act, as he shall from time to time deem necessary; and all regulations adopted by the said Commandant of the Coast Guard under the authority of this Act shall have the force of law. Two

printed copies of any such regulations for passing, signed by him, shall be furnished to each steam vessel, and shall at all times be kept posted up in conspicuous places on board. (33 U. S. C. 243.)

* * * * *

*Meeting end on*

RULE 17. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision each shall alter her course to starboard, so that each shall pass on the port side of the other. (33 U. S. C. 282.)

* * * * *

*Signals indicating course*

RULE 23. In all weathers every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied whenever required by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or, as provided in rule twenty-six:

One blast to mean, "I am directing my course to starboard."

Two blasts to mean, "I am directing my course to port." But the giving or answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels. (33 U. S. C. 288.)

*Rivers and channels*

RULE 24. That in all narrow channels where there is a current, and in the rivers Saint Marys, Saint Clair, Detroit,

Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right-of-way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take. (33 U. S. C. 289.)

* * * * *

*Precautions*

RULE 28. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (33 U. S. C. 293.)

* * * * *

*Dissent to signal given*

RULE 26. If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse. (33 U. S. C. 291.)

## UNITED STATES COAST GUARD PILOT RULES FOR THE GREAT LAKES

**Title 33, Code of Federal Regulations, Chapter 1, Subchapter E, Part 90**

**90.01. General instructions.**—The regulations in this part govern pilots of vessels propelled by steam, gas, fluid, naphtha, or electric motors, and of other vessels propelled by machinery, navigating the Great Lakes and their connecting and tributary waters as far east as Montreal.

**90.1 Signals.**—(a) In all weathers every steam vessel under way, in taking any course authorized or required by the rules in this part, shall indicate that course by the following signals on her whistle, to be accompanied, whenever required, by corresponding alteration of her course; and every steam vessel receiving a signal from another shall promptly respond with the same signal or sound the danger signal as provided in § 90.2.

(b) Except as otherwise provided in the rules in this part, one blast shall mean, "I am directing my course to starboard"; two blasts shall mean, "I am directing my course to port."

**90.2 Danger signal.**—If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously or from other causes, the pilot so in doubt shall immediately signify the same by giving the danger signal of several short and rapid blasts of the whistle not less than five; and if both vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway, and, if necessary, stopped and

reversed, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

**90.3 Cross signals.**—Steam vessels are forbidden to use what has become technically known among pilots as "cross signals"—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in the rules in this part, which for any reason he deems injudicious to comply with, instead of answering it with a cross signal, shall at once sound the danger signal and observe the rule applying thereto (§ 90.2).

**90.4 Vessels passing each other.**—The whistle signals indicating course shall be given and answered in accordance with the rules, not only when an alteration of course is required, but at all times before vessels approach within half a mile of each other, from whatever direction, if their courses will bring them within that distance from each other.

**90.5 Vessels approaching each other "head and head."**—When steam vessels are meeting end on, or nearly end on, it shall be the duty of each steam vessel to pass on the port side of the other; and the pilot of either steam vessel may be first in determining to pursue this course, and thereupon shall give, as a signal of this intention, one distinct blast of his whistle, which the pilot of the other steam vessel shall answer promptly by a similar blast of his whistle, and thereupon such steam vessels shall pass on the port side of each other. But if the courses of such steam vessels are so far on the starboard of each other as not to be considered by the pilots as meeting end on, or nearly end on, the pilot so first deciding shall immediately give two distinct blasts of his whistle, which the pilot of the

other steam vessel shall answer promptly by two similar blasts of his whistle, and they shall pass on the starboard side of each other: *Provided, however*, That in all narrow channels where there is a current, and in the rivers St. Marys, St. Clair, Detroit, Niagara, and St. Lawrence, when two steam vessels are meeting, the descending steam vessel shall have the right of way and shall, before the vessels shall have arrived within the distance of half a mile of each other, give the signal necessary to indicate which side she elects to take.

**Canada Shipping Act of 1934**

*640.* (1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that

(a) if, having regard to all the circumstances of the cause, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;

(b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed, and

(c) nothing in this section shall effect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.

FILED
JUL 25 1961
JAMES R. BROWNING, Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 168.

PARTENREEDEREI "WALLSCHIFF,"
owner of the
M/V WALLSCHIFF,
and
AMERICAN SEATING COMPANY OF
HARTFORD, CONNECTICUT, *et al.*,
*Petitioners,*
vs.
THE STEAMER PIONEER,
and
THE CLEVELAND CLIFFS IRON COMPANY,
as bareboat chartered owner of the
STEAMER PIONEER,
*Respondents.*

## BRIEF FOR THE RESPONDENTS
**In Opposition to the Petition for Writ of Certiorari.**

LEE C. HINSLEA,
LUCIAN Y. RAY,
860 Union Commerce Building,
Cleveland 14, Ohio,
*Counsel for Respondents.*

McCREARY, HINSLEA & RAY,
860 Union Commerce Building,
Cleveland 14, Ohio,
*Of Counsel.*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

## TABLE OF CONTENTS.


Counter-Statement of Question Presented ... 1

Counter-Statement of Facts ... 2

Argument ... 6

Point I. This case does not involve an important question of federal law. The issues involved are ones of fact on which both lower courts have ruled adversely to the petitioners. The allocation of fault by the Trial Court will not, except in rare instances, be disturbed by an appellate tribunal ... 6

Point II. The primary cause of the collision was the sudden inexcusable turning or sheering of the Wallschiff across the river and across the bow of the Pioneer. In comparison, the fault of the Pioneer was so slight that complete exoneration under either American or Canadian law would have been justified. There is no conflict between the decision below and the ones upon which the petitioners rely ... 11

Point III. The Pioneer's first two-blast passing signal to the Wallschiff was sounded before the vessels were within one-half mile, in full compliance with the Great Lakes Pilot Rules ... 16

Summary of Reasons for Denying the Writ ... 19

Conclusion ... 19

## TABLE OF CASES.


*Atlanticos, The*, 75 Ll. L. Rep. 160 (Admiralty Division 1943) ... 10

*Bryde v. The Montcalm*, 1913 A. C. 472; 19 Ex. C. R. 156 ... 13

*Bull, A. H., S. S. Co. v. United States*, 34 F. (2d) 614 (C. C. A. 2) ... 15

*Cavelier, The, v. Liverpool Shipping Company*, 1931 Ex. C. R. 205 ... 12

*Chisholm, The William*, 153 Fed. 704 (C. C. A. 6) ... 12

*Clara, The*, 2 Cir., 55 F. 1021 ... 14

*Compania De Maderas, etc. v. The Queenston Heights*, 220 F. (2d) 120 (C. C. A. 5) ... 18

*Cuba, The, v. Ronald McMillan et al.*, 26 S. Ct. of Canada Reports 651 ... 13

*Graham v. Standard Wholesale Phosphate etc.*, 181 F. (2d) 50 (C. C. A. 4) ... 12

*Hartlepool, The*, 62 Ll. L. Rep. 117 (Admiralty Division 1938) ... 10

*Luckenbach v. McCahan Sugar Co.*, 248 U. S. 139 ... 6

*Macgregor, The*, Times Law Reports, Vol. 59 (1942) 61 ... 8

*Magnum Co. v. Coty*, 262 U. S. 159 ... 6

*Minnesota S. S. Co. v. Lehigh Valley Transportation Co.*, 129 Fed. 22 (C. C. A. 6) ... 12

*New York, The*, 175 U. S. 187 ... 15

*Perseverance, The*, 2 Cir., 63 F. (2d) 788 ... 14

*Rend, In re*, 126 Fed. 564 (D. C. Minn.) ... 12

*Syosset, The*, 2 Cir., 71 F. (2d) 666 ... 14

# In the Supreme Court of the United States

**OCTOBER TERM, 1961.**

**No. 168.**

---

PARTENREEDEREI "WALLSCHIFF,"
owner of the
M V WALLSCHIFF,
and
AMERICAN SEATING COMPANY OF
HARTFORD, CONNECTICUT, *et al.*,

*Petitioners,*

vs.

THE STEAMER PIONEER,
and
THE CLEVELAND CLIFFS IRON COMPANY,
as bareboat chartered owner of the
STEAMER PIONEER,

*Respondents.*

---

## BRIEF FOR THE RESPONDENTS
**In Opposition to the Petition for Writ of Certiorari.**

---

## COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether, in construing the Canadian rule of proportionate fault in maritime collisions this Court, in the absence of a showing that the apportionment made by the Trial Court is arbitrary or capricious, should decline to interfere with that apportionment as approved by the Court below.

## COUNTER-STATEMENT OF FACTS.

On the date of the collision the Pioneer, a conventional Great Lakes bulk carrier loaded with a cargo of iron ore, was downbound in the St. Clair River. The Wallschiff, a motor vessel of German registry, was upbound laden with a partial cargo of steel sheets and was on her maiden Great Lakes voyage.

The following findings of fact of the Trial Court were based upon conflicting evidence, with substantial reliance being placed upon the testimony of an unusual number of outside disinterested witnesses which supported, in its important and relevant details, the account of the accident given by the crew of the Pioneer:

"At a time when the Pioneer was one-half mile or more upstream from the Wallschiff, the Pioneer's Master observed the Wallschiff coming upstream to and about one hundred feet from the American shore. The downbound Pioneer, when well within the required distance, exercised its right of election to make a starboard-to-starboard passage and sounded a two-blast passing signal to the upbound Wallschiff. The Pioneer got no response from the Wallschiff, and the Wallschiff continued its parallel course along the American shore." (Appendix A, 23a.)

"After a lapse of about thirty seconds, following the first two-blast signal, the Pioneer, in the absence of a response from the Wallschiff, sounded a danger signal for the purpose of alerting or waking up the Master of the Wallschiff. The danger signal was followed by a second two-blast signal. At about the time of the sounding of the second two-blast signal and when a distance of approximately twelve hundred feet separated the boats, the Wallschiff suddenly and without warning swung or sheered to starboard and headed across the river at about a forty-

five degree angle. The Pioneer had been continuing its course to port and, when the Wallschiff changed her course, swung hard over to port."

"The Pioneer did not reduce her speed, reverse her engines, or change her wheel from hard aport until she was approximately two hundred feet from the Wallschiff, at which time the wheel was put amidships and the engines were reversed. This, however, made no appreciable change in the speed of the Pioneer and she struck the Wallschiff aft of amidships, the angle of collision being approximately ninety degrees. * * *" (Appendix A, 23a, 24a.)

"Prior to the crossing the river at a forty-five degree angle, the Wallschiff was navigating close to and parallel with the American shore. From the time the Pioneer observed the Wallschiff until the time of that vessel's sudden and inexcusable sheering across the river, both vessels were in safe position to pass if the Wallschiff had not sheered across the bow of the Pioneer. The collision could not have occurred had the Wallschiff continued on the course it was proceeding on when it first received the two-blast signal and had it given any heed to such signal, to the danger signal, or to the second two-blast signal." (Appendix 25a.)

"The Pioneer was not guilty of negligence or fault in what the Master of that vessel did, or failed to do, from the time the Wallschiff started its abrupt course to its starboard, nor is the Pioneer guilty of contributory fault because of the failure to drop its anchors."

"The Wallschiff was not being navigated with the care that the situation at hand called for and the collision was caused, primarily, by the conduct of the Wallschiff. The faults of the Wallschiff were so gross that, under the comparative negligence rule, she is chargeable with and

responsible for ninety-five percent of the total provable damages sustained by both vessels." (Appendix A, 26a.)

"* * * The silence of the Wallschiff upon receiving the first two-blast signal from the Pioneer should have placed the Master of the Pioneer in some doubt. It was not necessary for him to immediately, upon failure to get a responsive signal, reverse his engines and reduce his speed. It cannot be said with mathematical nicety how many seconds a Captain should wait for an answering signal. Thirty seconds, however, without action followed by a danger signal, still without action and without full assurance of a safe passage, persuades this Court that he cannot completely exonerate Captain O'Leary of fault." (Appendix A, 25a.)

"* * * The Pioneer's fault was not at all of the character or gravity of that of the Wallschiff, and under the same rule of negligence, she is chargeable with and responsible for five percent of the total provable damages sustained by both vessels." (Appendix 25a, 26a.)

The Trial Court concluded that "The collision was due, primarily, to the faults of the M/V Wallschiff, which were major and inexcusable. The fault of the Steamer Pioneer was minor and contributed in only a slight degree to the collision." (Appendix A, 27a.)

The District Court's view concerning the disparity in the faults of the two vessels is best expressed in the following language contained in its Opinion:

"* * * This Court is not impressed, however, that the Pioneer's fault was at all of the character or gravity of that of the Wallschiff, but it cannot be eliminated entirely. Some Court might find that the Pioneer's fault was so minimal and the Wallschiff's so gross as to cast the entire burden of fault upon the Wallschiff. With the opportunity

here to apportion damages, this Court does not feel that it should do so * * *."

* * * * *

"If the American rule had to be applied in this case, with equal division of the damages, this Court might, indeed, imitate many of its predecessors and seek to avoid injustice by excusing the Pioneer under the major-minor fault doctrine. Being constrained to find there was some violation of Rule 26, *supra*, by the Pioneer's master, this Court is grateful for the circumstances that this collision happened in Canadian waters." (Appendix A, 19a.)

The *per curiam* action of the Court below was an affirmance based upon the reasons stated in the findings of fact, conclusions of law and opinion of the District Court. The order of the United States Court of Appeals, denying the petitioner's petition for rehearing *en banc* constituted a reaffirmance of the District Court's findings and conclusions. (Appendix A, 33a, 34a.)

## ARGUMENT.

### POINT I.

**This case does not involve an important question of federal law. The issues involved are ones of fact on which both lower courts have ruled adversely to the petitioners. The allocation of fault by the Trial Court will not, except in rare instances, be disturbed by an appellate tribunal.**

The petitioners, in requesting this court to review the record in a marine collision case and to substitute its judgment for that of the two lower courts on issues of fact are faced with the familiar principle that findings of fact, concurred in by the lower tribunals will be accepted unless clear error is shown. As was succinctly said in *Magnum Co. v. Coty*, 262 U. S. 159, 163:

> "* * * The jurisdiction (certiorari) was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. * * *"

Adherence to the above mentioned principle in maritime cases has been uniform. In *Luckenbach v. McCahan Sugar Co.*, 248 U. S. 139, 145 this Court states:

> "The owners contend that both lower courts erred in holding that the steamer was unseaworthy at this commencement of her voyage and that due diligence to make her seaworthy had not been exercised. The issue involved is one of fact; and no reason appears why the general rule should not apply, that concurrent decisions of the two lower courts on an issue of fact will be accepted by this court unless shown to be clearly erroneous. *The Wildcroft*, 201 U. S. 378, 387; *The Carib Prince*, 170 U. S. 655, 658."

As is the situation in most collision cases the findings of fact here were based upon conflicting evidence. The

background of the resolving of that conflict is thus stated by the District Court (Appendix A, 5a):

> "The Court is satisfied from all of the evidence that the principal and major fault in this case was that of the Wallschiff. Aside from the weight, or lack of it, which this Court finds in the conflicting evidence of the members of the respective crews, the Court is greatly helped by the testimony of disinterested eyewitnesses along the Michigan shore who had an opportunity to observe the movements of the boats in question and to hear the signals given during the time the boats were approaching each other prior to and at the time of the collision. Not all of the outside witnesses corroborated the testimony of the crew of the Pioneer. A witness who was on the porch of the Westcott Marine Reporter Station on the Port Huron shore, and a witness who was on the Canadian shore gave testimony which tended to support the account of the crew of the German boat. The Court is satisfied, however, that the record will fully justify his conclusion that they lacked sufficient credibility to seriously detract from the weight the Court is giving to the other disinterested witnesses. There are discrepancies as to time, distances and other details between the account of the various disinterested witnesses produced by the Pioneer, but in the main, their testimony heavily supports the broad picture of the events as given by the members of the crew of the Pioneer and its master."

The facts which the Trial Court found are fully supported by the record. Its conclusions, based upon those facts, are in accord with applicable legal principles. The findings and conclusions have received the unqualified approval of the Court below. No significant reason has been advanced why this Court should depart from its time honored refusal to review the evidence.

The petitioners urge that the time has now come for this Court to pass on the principles governing the Canadian proportionate fault rule. What they are, in effect, asking is that this Court chart the course for the lower courts so that in a given situation they will know how to allocate the faults, percentage-wise, of the respective vessels. They are not only requesting this Court to accomplish the impossible but their argument is contrary to the rulings of the English and Canadian courts which have had long and varied experience in dealing with this very principle. Those courts recognize that no two cases are alike; that each must be decided on its own facts as far as percentages of fault are concerned and that precedents are of little or no value. They further are of the view that inasmuch as the allocation of fault necessarily involves the delicate weighing of multiple considerations only exceptional circumstances will justify a revision by an appellate court of the trial court's apportionment of blame.

The House of Lords has pointed out that where an appellate court has accepted the trial court's findings of fact that two ships in collision were both to blame, it will be entitled, in only very exceptional circumstances, to revise the apportionment of liability which the trial court has made. In *The Macgregor,* Times Law Reports, Vol. 59 (1942) 61, 62, the Lord Chancellor said:

> "* * * It seems to me that the cases must be very exceptional indeed in which an appellate Court, while accepting the findings of fact of the Court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial Judges. * * * I apprehend that if a number of different reasons were given why one ship is to blame, but on examination some of these reasons were in the Court of Appeal found not to be valid, that might have the effect of altering the distribution of the burden.

If there were a case in which the Judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that might perhaps be—it would be I think—a reason for considering whether there should be a change made on appeal. But, subject to rare exceptions, I submit to the House that when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare."

Lord Wright had the following to say in concurring with the Lord Chancellor (p. 62):

"It seems to me that these observations of three very eminent Judges are quite in accord with what was said in *The Umtali* (*supra*), and with what the Lord Chancellor has just said. I do not say, any more than they did, that under proper conditions, such as those indicated by the three members of the Court of Appeal in The Karamea (*supra*), the Judge's apportionment might not be interfered with by an appellate Court, *but I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and is different in essence from a mere finding of fact in the ordinary sense. It is question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that the Courts have warned an appellate Court against interfering, save in very exceptional circumstances, with the Judge's apportionment.* The accepted rule was clearly stated by Lord Buckmaster, with the assent of the other Lords, in

> *The Otranto* (47 The Times L. R. 163, at p. 166; [1931] A. C. 194, at p. 204), in these words: '*Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the Judge at the trial, and unless there is some error in law or in fact in his judgment it ought not to be disturbed.*' " (Emphasis supplied.)

Even if it were assumed, *arguendo,* that no Canadian court has made a more divergent apportionment than 75/25%, that would not constitute a persuasive reason why the Trial Court in the instant case should not have made the apportionment which it did or why that apportionment should be disturbed by this Court. It necessarily rests with the trier of facts to translate the degrees of fault into percentages and, assuming that the apportionment is not arbitrary or capricious who is to say, in a given case, that a 90/10% or any other apportionment would be a more just result than 95/5%.

The petitioner has referred to decisions of the British and Canadian courts (Petition p. 8). There are others where the apportionment closely approximates the one at bar. In *The Hartlepool,* 62 Ll. L. Rep. 117 (Admiralty Division 1938) the apportionment was 90/10% and in *The Atlanticos,* 75 Ll. L. Rep. 160 (Admiralty Division 1943) the apportionment made by the Court was five sixths and one sixth. It seems obvious that each case must stand on its own feet as far as apportionment of fault is concerned and that precedents cannot be controlling. Although such a result would admittedly require fine sighting there is no sound legal reason, if the facts justify it, why an apportionment, under the comparative negligence rule as incorporated in the Canada Shipping Act of 1934, could not be on the basis of 99/1%.

The anticipated increase in traffic on the Great Lakes because of the advent of the St. Lawrence Seaway does not,

as suggested by the petitioners, increase the importance of the issue involved. Such collisions as do occur will have to take place in Canadian waters, irrespective of the nationality of the vessels, before the proportionate fault rule will be applicable and if the past is any guide to the future our courts will be applying the American rule of mutual fault and divided damages in most of the litigated cases. We suggest, in that connection, it is highly significant, that, in spite of the heavy traffic on the Great Lakes, both before and after the completion of the Seaway and the substantial number of collisions which have occurred, this is the first case in which the intervention of this Court has been sought to interpret the meaning of a principle of collision law foreign to this jurisdiction and to supply the ground rules for application to specific cases. In the rare instances where the issues are likely to arise the District Courts and the Circuit Courts of Appeal are fully qualified to deal with them on a fair and an equitable basis.

## POINT II.

**The primary cause of the collision was the sudden inexcusable turning or sheering of the Wallschiff across the river and across the bow of the Pioneer. In comparison, the fault of the Pioneer was so slight that complete exoneration under either American or Canadian law would have been justified. There is no conflict between the decision below and the ones upon which the petitioners rely.**

Prior to crossing the river at a forty-five degree angle the Wallschiff was navigating close to (approximately 100 feet) and parallel with the American shore. From the time the Pioneer observed the Wallschiff until the time of that vessel's sudden and inexcusable sheering across the river, both vessels were in a safe position to pass, if the Wallschiff had not sheered across the bow of the Pioneer.

The collision could not have occurred had the Wallschiff continued on the course she was proceeding on when she received the two-blast signal and had she given any heed to that signal, to the danger signal, or to the second two-blast signal. From the moment the Pioneer began the swing to her left, and this was before the Wallschiff started across the river, she was proceeding on a course away from the course on which the Wallschiff was proceeding prior to that vessel's sharp turn to her right, and, in the absence of that right turn, the collision would not have occurred.

There is complete justification for the conclusions of the Courts below that the "principal and major fault in this case was that of the Wallschiff and that it was grave and inexcusable." (Appendix A, 14a.)

American courts, on numerous occasions, have condemned vessels, in full, where they have departed from their courses into the paths of oncoming steamers.

See:

*Minnesota S. S. Co. v. Lehigh Valley Transportation Co.*, 129 Fed. 22, 24 (C. C. A. 6);

*The William Chisholm*, 153 Fed. 704, 713 (C. C. A. 6);

*Graham v. Standard Wholesale Phosphate etc.*, 181 F. (2d) 50, 52 (C. C. A. 4);

*In re Rend*, 126 Fed. 564 (D. C. Minn.).

The Canadian courts are in complete accord on the proposition that the unwarranted attempt on the part of one vessel to cross the bows of an approaching steamer is enough to make the former solely liable. In *The Cavelier v. Liverpool Shipping Company*, 1931 Ex. C. R. 205, the collision occurred in Halifax Harbor with the bow of the Cavelier striking the Kenny on her starboard quarter.

The Kenny, prior to the collision, had suddenly altered her course to port and had attempted to cross the bow of the other vessel. The Trial Court found both vessels at fault. In reversing and ruling that the Kenny was solely to blame the Appellate Court stated (pp. 214, 215):

> "Previous to the time the Kenny altered her course, both vessels were travelling in opposite directions, each showing her red lights. While in that position, the master of the Kenny, without signalling, changed his course to port, against the strict inhibition of such course provided by the rules of the road and aggregated his manoeuvre by admitting in his evidence that he did not look at the Cavelier immediately before altering his course."
>
> "I have come to the conclusion that the master of the Kenny has violated Articles 19, 22, 23, 27 and 29 of the International Rules of the Road. There was no justification for altering his course under the circumstances, and much more so without any signal to the other vessel of such intention, and that he is guilty of mismanagement and bad seamanship. This manoeuvre was erratic and devoid of any seamanship. He created the danger of collision, placed the Cavelier in the agony of collision while the latter has shown all through good seamanship and has done all in her power to avoid this collision."
>
> "The Kenny is solely to blame for the collision; she should not have attempted to cross the bow of the Cavelier under the circumstances. The appeal is allowed with costs both before this Court and before the trial judge."

Also see:

*Bryde v. The Montcalm*, 1913 A. C. 472; 19 Ex. C. R. 156;

*The Cuba v. Ronald McMillan et al.*, 26 S. Ct. of Canada Reports 651.

The only fault which the Courts below found against the Pioneer was the failure of Captain O'Leary to reverse his engines during the thirty-second interval between the first two-blast passing signal and the danger signal which were sounded to the Wallschiff. This, those Courts said, constituted *some* violation of Rule 26, which charged him with *some responsibility, however slight*, for the collision. (Appendix A, 15a.) The navigation of the Pioneer was otherwise approved. (Appendix A, 16a.)

It is abundantly clear that the Courts below considered that the faults of the Wallschiff were sufficient, in and of themselves, to account for the collision. Even assuming the existence of a technical violation of Rule 26 by the Pioneer, it is clear that the failure to strictly comply with its requirements was a "condition" and not a "cause" of the collision. The operation of that doctrine is set forth in the following language contained in *The Perseverance*, 2 Cir., 63 F. (2d) 788, at p. 790:

> "As to the ship, we are disposed to exonerate her, though she was at fault as we have said. We accept the common form of statement that the fault must be a 'cause,' not a 'condition,' of the collision. By that, as we said in The Socony No. 19, 29 F. (2d) 20, we mean that although the fault was a cause, in the sense that it was a part of those circumstances necessary to the occurrence, the tug was amply advised in advance of the ship's position, and could have avoided her by proper navigation. * * *"

Also see:

*The Syosset*, 2 Cir., 71 F. (2d) 666;
*The Clara*, 2 Cir., 55 F. 1021, 1023.

The failure to reverse may have been "part of the circumstances necessary to the occurrence," but as a "cause" of the collision it pales into insignificance when compared with the sudden, unwarranted and unexpected

alteration of the course of the Wallschiff. The disparity between the faults is self-evident. It is, we submit, accurately reflected by the allocation, percentage-wise, made by the District Court and approved by the Court below.

In assessing fault against the Pioneer the Trial Court cited and quoted from the very decisions which the petitioners now suggest are in conflict with the rulings below. (Appendix A, 17a-19a.)

In *The New York*, 175 U. S. 187, this Court applied the American doctrine of mutual fault and divided damages to a factual [illegible] where the respective vessels were of equal gravity. This is a far cry from the instant case where a construction of the comparative negligence rule is involved and where, after a painstaking evaluation of all of the circumstances by the Court charged with that responsibility, the conclusion was reached that the Pioneer's fault contributed in only a slight degree to the collision. The circumstances surrounding each collision are different and we submit this Court in *The New York*, *supra*, did not intend that the apportionment of fault contained therein should apply to all factual situations.

There is a similar absence of conflict with the other decision upon which the petitioners rely. The Courts below quoted from *A. H. Bull S. S. Co. v. United States*, 34 F. (2d) 614, 616 (C. C. A. 2), in connection with the duty of a master to promptly take action in failing to receive a responsive signal but their refusal to impose a 50% liability on the Pioneer does not create a variance which this Court must resolve. The ruling of mutual fault and divided damages in the *Bull* case, *supra*, was based upon a specific finding that the collision would have been avoided had the speed of one of the vessels been seasonably reduced. In that connection the Court said (p. 616):

"* * * Had the Clare done her duty shortly after her first signal—that is as soon as she was in doubt as to the Chinook's navigation—this collision would not have happened. If she had done it as soon as the Chinook began to swing upon her course, it probably would not have happened. * * *"

The Trial Court in the case at bar did not conclude that if the Master of the Pioneer had attempted to reduce his speed, the collision would have been avoided. In that connection it made the much softer statement that it could not have been avoided had Captain O'Leary been earlier concerned and had he taken steps to reduce the speed of his vessel, the collision would, nevertheless, have occurred or that it would have as severe as it was. (Appendix A, 18a.)

**POINT III.**

**The Pioneer's first two-blast passing signal to the Wallschiff was sounded before the vessels were within one-half mile, in full compliance with the Great Lakes Pilot Rules.**

The Trial Court found that "At a time when the Pioneer was over one-half mile upstream from the Wallschiff, the Pioneer's master observed the Wallschiff coming upstream close to and about one hundred feet from the American shore; * * * that while still better than one-half mile away, the captain sounded a two-blast passing signal * * *." (Appendix A, 62.)

In that connection the Trial Court also said:

"* * * As to the distance the Pioneer was when they blew the first blast, there are varying statements of its location at that time, but they all did indicate that the Pioneer was coming under, or coming out from under the Blue Water bridge. This would corroborate the Master's testimony that he was more than one-half

mile away from the Wallschiff when he blew his first passing signal * * *." (Appendix A, 12a.)

The sounding of the above mentioned signal was in complete compliance with Great Lakes Pilot Rule 24 (Appendix A, 36a). It also indicated, without question, that Captain O'Leary had the Wallschiff under observation and that his handling of the Pioneer from that moment on was with the Wallschiff in mind. The Wallschiff was seen by the master of the Pioneer and the passing signal was sounded while the vessels were a safe distance from each other and on non-collision courses. If those on the Wallschiff had been alert, the agreement for a starboard-to-starboard passage would have been established. The Trial Court found that there was an indication in the testimony that the Master of the Wallschiff was not aware of where he really was as he approached the Pioneer (Appendix A, 13a). It does not lie in the mouths of those representing a vessel which was obviously lost and which did not answer any signals to charge the other vessel with a failure to have sounded the signals earlier. Also, even if the validity of Coast Guard Pilot Rule 90.4 were conceded, the strange and completely unexplained silence on the part of the Wallschiff would have made the securing of a passing agreement impossible.

The importance of maintaining an adequate lookout is not disputed. The record herein fully supports the rulings below that such a lookout on the Pioneer was being kept. Two officers in the pilot and an unlicensed man on the bow all had the Wallschiff under observation. Even when the Wallschiff was below the Waterworks and the Pioneer was above the Blue Water Bridge the Wallschiff was close to the American shore and the situation then, as at the time when the two-blast signal was sounded, was a simple starboard-to-starboard passing, without complica-

tions. It remained so until the Wallschiff headed across the river and no prior intelligence transmitted to Captain O'Leary concerning the activities of the Wallschiff would have changed the situation one iota.

Even if a vigilant lookout is not being kept the failure to do so must have contributed to the collision before it has any significance. In *Compania De Maderas, etc., v. The Queenston Heights*, 220 F. (2d) 120, (C. C. A. 5) the failure to have a lookout on the bow was alleged as a fault which should condemn one of the vesseis. The Court below had, in fact, done so. In reversing that portion of the trial court's findings, the Court of Appeals said (p. 122):

> "From the undisputed testimony, we are of the opinion that the failure to have a lookout on the bow of the Star did not actively contribute to the cause of the collision. The finding to the contrary by the court below was clearly erroneous. The only relation to the collision of the position of the Star's lookout is speculation that, had the lookout been in the bow, he might have heard a prior two-blast signal, which the Queenston claims to have sounded one-half minute before the two-blast signal that the Star did hear, which prompted the Star's danger signal; and that, if such a prior signal had been heard, the Star might have been able to take some action to avoid the collision. *It is difficult to perceive what action the Star could have taken to avert the collision in view of the action on the part of the Queenston.*" * * * (Emphasis supplied.)

## SUMMARY OF REASONS FOR DENYING THE WRIT.

This case is not one which requires the intervention of this Court. There are no principles nor rules of thumb to be laid down governing application of the Canadian rule of proportionate fault. The issues involved in this and cases of like nature are factual and the apportionment of fault varies with each case with the apportionment made by the trier of the facts usually accepted unless it has been arbitrarily and capriciously arrived at.

Even if the writ in this case were granted this Court could not establish standards which would be applicable to all cases arising under the above mentioned rule and the alleged public importance of this litigation has been grossly exaggerated.

If the principles of American law had been applicable the Pioneer would probably have been accorded complete exoneration. With two Courts having already ruled that the reckless navigation of the Wallschiff was the primary cause of the collision no sound reason has been advanced by the petitioners why this Court, contrary to its custom, should be required to examine the facts and weigh the testimony in this record.

## CONCLUSION.

For the reasons stated the respondents respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted.

LEE C. HINSLEA.
LUCIAN Y. RAY.
*Counsel for Respondents*

McCREARY, HINSLEA & RAY,
*Of Counsel.*

Office-Supreme Court, U.S.
FILED
AUG 22 1961
JAMES R. BROWNING, Clerk

# Supreme Court of the United States

OCTOBER TERM 1961

No. 168.

PARTENREEDEREI "WALLSCHIFF", owner of the [illegible] and AMERICAN SEATING COMPANY and AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, ET AL.,

*Petitioners,*

*—against—*

THE STEAMER PIONEER and THE CLEVELAND-CLIFFS IRON COMPANY, as bareboat chartered owner of the Steamer Pioneer,

*Respondents.*

## PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MACDONALD DEMING,
*Counsel for Petitioner*
*Partenreederei "Wallschiff"*
80 Broad Street
New York 4, N. Y.

RICHARD F. SHAW,
*Counsel for Petitioners*
*American Seating Company, et al.*
99 John Street
New York 38, N. Y.

RICHARD G. ASHWORTH,
DONALD M. WAESCHE, JR.
*Of Counsel*

IN THE

# Supreme Court of the United States

OCTOBER TERM 1961

| | |
|---|---|
| PARTENREEDEREI "WALLSCHIFF", owner of the M V WALLSCHIFF, and AMERICAN SEATING COMPANY and AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *et al.*, *Petitioners,* —*against*— THE STEAMER PIONEER and THE CLEVELAND-CLIFFS IRON COMPANY, as bareboat chartered owner of the STEAMER PIONEER, *Respondents.* | No. 168. |

## PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents' brief in opposition to the petition concedes that this Court should review the apportionment of fault in a collision case where the apportionment is "arbitrary and capricious". It was indeed in the present case arbitrary and capricious for the Trial Court to allocate only 5% fault to the Pioneer, which failed, because of improper lookout, to observe the approaching Wallschiff until barely a minute before collision and which ignored the judicial, legislative, and administrative mandates to stop her engines and reverse until a passing agreement had been reached, than which "There is no more important rule", *J. H. Bull S. S. Co., v. United States*, 34 F. 2d 614, 616.

Respondent is incorrect in arguing that "The issues involved are ones of fact". The petition accepts the findings of fact of the Trial Court, which held that the Pioneer's master first realized that the Wallschiff was approaching when the vessels were only "about one half mile" apart (Appendix, p. 3a) and that the Pioneer continued on at full speed ahead, without a passing agreement, until the vessels were only 200 feet apart (Appendix, pp. 7a-7a). It is on these very facts found by the Trial Court that the Courts below should have held as a matter of law that the Pioneer was in gross violation of the requirements for safe navigation imposed by the Courts, by Congress, and by the Coast Guard.

Petitioners respectfully submit that to leave uncorrected the allocation of only 5% responsibility to the Pioneer in this proportionate fault case will result in circumvention of basic principles of United States Maritime Law, regarding the importance of obeying the Rules of the Road, because of misapprehension of the principles governing apportionment of fault in jurisdictions where that rule is applied. We respectfully submit that it is of particular importance that this Court correct the misapplication of Canadian law, in view of the growing commerce on the Great Lakes, now developing as the Fourth Seacoast of the United States.

August 21, 1961.

Respectfully submitted,

MacDonald Demuth,
*Counsel for Petitioner,*
*Partcutteredcl "Wallschiff"*

Richard F. Shaw,
*Counsel for Petitioners,*
*American Seating Company, et al.*

Richard G. Ashworth
Donald M. Waesche, Jr.,
*Of Counsel.*